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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

FERMIN CARDENAS,

Defendant and Appellant.

2d Crim. No. B169818  
(Super. Ct. No. BA242633)  
(Los Angeles County)

Fermin Cardenas appeals from the judgment entered after a jury found him guilty of driving under the influence causing injury, and driving with a .08 percent blood alcohol level (Veh. Code, § 23153, subs. (a), (b)). The jury also found true the allegation that Cardenas personally inflicted great bodily injury upon his victim (Pen. Code, § 12022.7), which rendered his offenses serious felonies (Pen. Code, § 1192.7, subd. (c)(8)). He was sentenced to four years and four months in state prison. He contends the trial court violated his due process rights by failing to excuse a juror.<sup>1</sup> We affirm.

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<sup>1</sup> Cardenas initially raised this claim and several others in a petition for a writ of habeas corpus. As the People correctly note, habeas corpus review of the claim is not available because it is cognizable on direct appeal. (See *In re Dixon* (1953) 41 Cal.2d 756, 759.) The writ petition is denied this same date in a separate order. (See *In re Cardenas*, B171083.)

## FACTS AND PROCEDURAL HISTORY

On January 17, 2003, Carlos Pineda was driving on Vernon Avenue in Los Angeles when a truck driven by Cardenas struck him. As a result of the collision, Pineda suffered a broken wrist and a head laceration that required seven stitches. Cardenas stipulated that his blood alcohol level was .19 at the time of the accident.

Various witnesses to the accident verified that Cardenas was driving the truck. Bruno Cortez, however, testified that when Cardenas and Eduardo Ornelas left his house in the truck shortly before the accident, Ornelas was driving and Cardenas was a passenger.

## DISCUSSION

Cardenas's retained attorney initially filed a brief raising no issues and requesting that we review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. The People did not file a response to that brief. We subsequently ordered Cardenas to brief an issue on appeal that had been improperly raised in a petition for a writ of habeas corpus, namely, whether the trial court violated Cardenas's due process rights by refusing to dismiss a juror during deliberations. For the first time in their respondent's brief, the People contend that *Wende* review was not available in this case because Cardenas is represented on appeal by retained, as opposed to appointed, counsel. (See *People v. Placencia* (1992) 9 Cal.App.4th 422, 428 [recognizing that retained counsel abandoned his client's appeal when he advised the appellate court there were no arguable issues and requested independent review pursuant to *Wende*].) The People alternatively argue that, in any event, Cardenas's claim regarding juror number three fails on the merits.

Although we agree that *Wende* review was not warranted in this case, Cardenas's attorney initially raised the issue on which we ordered briefing in a petition for a writ of habeas corpus. Because the issue could have been raised on direct appeal, writ review was unavailable. (*In re Dixon, supra*, 41 Cal.2d at p. 759.) In the interests of justice, we ordered Cardenas's attorney to file an opening brief in order to rectify his error in seeking habeas corpus relief for a claim that could have been raised on direct appeal. Accordingly, we address the claim.

On the merits, however, the claim fails. The challenged incident arose during jury deliberations, when juror number three told the court she believed she may have seen defense witness Cortez within the last year in the Santa Monica area, "and that the person may not have been acting in a way that is consistent with what I see on the stand at this point, and for that reason it may cloud my thinking . . . ." The prosecutor indicated that the juror must have been mistaken about recognizing Cortez because he was in Mexico when she allegedly saw him in Santa Monica. The interpreter further noted that Cortez's physical appearance was different from the previous year, when he had long hair and was clean shaven. The court then notified the juror "that if we go back approximately one year, the witness that testified on the stand looked entirely different. He had no beard, no goatee, and very long hair. . . . [¶] So I don't believe it's the individual that would look like this that you believe you saw in Santa Monica. He would have had a totally different look." The juror then indicated she was persuaded that Cortez was not the man she had seen. She also assured the court that she was not simply trying to get off the jury, and that she had no prearranged plans that would interfere with her duties as a juror in the case. Nevertheless, Cardenas's trial attorney asked the court to dismiss the juror because "her behavior indicates that she doesn't want to be a part of the panel . . . ." When pressed for specifics, counsel offered that the juror "wanted to refrain from taking lunch so that she could push through the deliberations during the lunch hour." The court denied the request stating, "Well, that's just a hard-working juror. An hour and a half lunch is a long lunch. Not too many people take that besides the courts."

We review the trial court's refusal to excuse a juror for an abuse of discretion (*People v. Fudge* (1994) 7 Cal.4th 1075, 1099-1100), and conclude there was none here. Although Cardenas claims the court was obligated to hold a more extensive hearing into the matter pursuant to Penal Code section 1120, we disagree. That section provides that "[i]f a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the

statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his discharge as a juror." The trial court's decision whether to hold a hearing pursuant to this section is also reviewed for an abuse of discretion. Such "' . . . a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) Moreover, where the juror does not claim to have personal knowledge of a fact in controversy, "it appears that a less formal inquiry is adequate to determine 'good cause' to discharge . . . ." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 837.) Because the challenged juror never claimed to have personal knowledge of any fact in controversy in the case, no formal hearing was required.

Moreover, the court's inquiry into the matter was sufficient to dispel any concerns about the juror's ability to impartially discharge her duties. As the People note, the juror never indicated any concern about partiality, and the court had the opportunity to observe her demeanor in determining that she could continue deliberating. (See, e.g., *People v. Beeler* (1995) 9 Cal.4th 953, 989 [recognizing that trial courts are in the best position to evaluate a juror's demeanor].) The court thus did not abuse its discretion in declining to dismiss the juror.

Cardenas's citation to *People v. McNeal*, *supra*, 90 Cal.App.3d 830, is unavailing. In *McNeal*, the jury foreman informed the court that another juror had disclosed personal knowledge about the testimony of a defense witness. Although the juror indicated that she could be impartial, the Court of Appeal reversed because the trial court failed to inquire into the factual basis for her knowledge, as required by Penal Code section 1120. (*Id.*, at pp. 835-836.) As we have already explained, the court in this case was not obligated to conduct a Penal Code section 1120 hearing because the juror did not

claim to have personal knowledge about any matter in dispute in the case.

The judgment is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Rand S. Rubin, Judge  
Superior Court County of Los Angeles

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